

1 THE HONORABLE JOHN C. COUGHENOUR
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9
10 UNITED STATES DISTRICT COURT
11 DISTRICT OF GUAM
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14 CARL T.C. GUTIERREZ, FRANK AGUON,
15 JR., and JOHN and JANE DOE CITIZEN
16 PLAINTIFFS 1-1000,

Case No. 1:10-cv-00031, 1:10-cv-00033

Plaintiffs,

ORDER

17 v.
18
19 THE GUAM ELECTION COMMISSION,
20 JOHN BLAS, JOSHUA TENORIO, JOSEPH
21 MESA, ALICE TAIJERON, JOHN
22 TERLAJE, ROBERT CRUZ, MARTHA
23 RUTH, JOHN TAITANO, EDWARD B.
24 CALVO, RAY TENORIO, and JOHN and
25 JANE DOE DEFENDANTS 1-1000,
26
Defendants.

I. BACKGROUND & PROCEDURAL HISTORY

On November 2, 2010, the Guam Election Commission (GEC) conducted the General Election of 2010 for Guam, which included elections for the offices of Governor and Lieutenant Governor. On the morning of November 3, the tabulated results indicated that the Republican gubernatorial candidates Edward B. Calvo and Ray Tenorio had garnered 19,879 votes, or 50.38 percent of the votes counted and that the Democratic candidates Carl T.C. Gutierrez and Frank Aguon had garnered 19,296 votes or 48.90 percent of the votes counted. On November 5, the GEC decided to conduct a machine recount of the gubernatorial ballots.

1 On November 6, the GEC certified the result of the machine recounts: 20,066 for Calvo-
2 Tenorio and 19,579 for Gutierrez-Aguon.

3 On November 19, Plaintiffs brought an action in federal court (10-cv-00031) alleging
4 that the manner in which the election and the recount had been conducted amounted to
5 violations of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and violations of Guam Election
6 Laws. Plaintiffs request that Court enter an order declaring that the election results certified by
7 the GEC are invalid, and to issue a writ requiring the GEC to conduct a new election. On
8 November 23, Plaintiffs filed an amended complaint. (Case No. 1:10-cv-00031 (Dkt. No. 8).)
9 On December 20, Defendants filed a motion to dismiss. (Case No. 1:10-cv-00031 (Dkt. No.
10 29).)

11 On November 23, Plaintiffs filed a second action (cv1891-10), this time in the Superior
12 Court of Guam, with substantially identical facts, parties, claims, and prayers for relief. (Case
13 No. 1:10-cv-00033 (Dkt. No. 5 at Ex. A).) On December 14, John Blas, Robert Cruz, Joseph
14 Mesa, Martha Ruth, Alice Taijeron, John Taitano, Joshua Tenorio, John Terlaje, and the Guam
15 Election Commission filed a notice removing the Superior Court action to the federal District
16 Court. (Case No. 1:10-cv-00033 (Dkt. No. 1).) Defendants Calvo and Tenorio did not consent
17 to the removal, and filed a motion to remand to the Superior Court of Guam. (Case No. 1:10-
18 cv-00033 (Dkt. No. 5).) The remaining Defendants have changed their position on removal and
19 now join in the motion for remand. (Case No. 1:10-cv-00033 (Dkt. No. 8).)

20 **II. ANALYSIS**

21 The first issue before the Court is Defendants' motion to remand Case No. 1:10-cv-
22 00033 to the Guam Superior Court. After a case has been removed to federal court, a party
23 may move to remand the case for any defect other than lack of subject matter jurisdiction. 28
24 U.S.C. § 1447(c). The Ninth Circuit has recognized that removal is defective if all defendants
25 do not consent to the removal. *See Aguon-Schulte v. Guam Election Comm'n*, 469 F.3d 1236,
26 1240 (9th Cir. 2006). As the removing Defendants concede, removal was made without the

1 unanimous consent of Defendants. (Case No. 1:10-cv-00033 (Dkt. No. 8).) Accordingly,
2 Defendants' motion to remand is GRANTED. (Case No. 1:10-cv-00033 (Dkt. No. 5).)

3 Due to the necessity of remanding to the Guam Superior Court, it is clear that the two
4 actions cannot be consolidated. This Court is therefore confronted with the potential for a
5 serious problem: one court ruling that the election results are valid and should be upheld, while
6 the other rules that they are invalid. In such a situation, the Court must consider whether it
7 would be appropriate to abstain from exercising its jurisdiction.

8 In *Colorado River*, the Supreme Court held that federal courts may abstain from
9 exercising their validly conferred jurisdiction in certain exceptional circumstances of parallel,
10 duplicative litigation. *Colo. River Water Conservation Dist.* v. United States, 424 U.S. 800,
11 817 (U.S. 1976). The Court identified four factors a federal court should consider in deciding
12 whether the interests of wise judicial administration outweigh a court's duty to exercise its
13 jurisdiction: (1) which court first assumed jurisdiction over property, (2) the relative
14 inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, and
15 (4) the order in which jurisdiction was obtained by the state and federal courts. In *Moses H.*
16 *Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (U.S. 1983), the Supreme Court
17 added two more considerations: (5) whether federal law provides the rule of decision on the
18 merits; and (6) whether the state court proceeding can adequately address the rights of the
19 federal plaintiff. *Id.* at 23. “[T]he decision whether to dismiss a federal action because of
20 parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing
21 of the important factors as they apply in a given case. *Id.* at 16.

22 Of these issues, the three most significant are (3), (5), and (6). The problem of
23 piecemeal litigation is severe. Under 48 U.S.C. § 1422, the term of the new Governor starts on
24 the first Monday of the year, January 3, 2011. There would be precious little time to reconcile
25 any discrepancies between the rulings of two different courts. Further, there is a clear need to
26 avoid the sort of crisis that divided the country in the aftermath of the 2000 presidential

1 election, where a conflict over the proper forum for contesting the election consumed all
2 available time in which to contest it. The Court agrees with Defendants that Plaintiffs' claims
3 should be resolved in a single forum. This factor, more than any other, counsels in favor of
4 abstention.

5 Second, it is Guam law that provides the rule of decision on the merits. Plaintiffs seek a
6 declaration that the election results are invalid and a writ ordering a new election. But the only
7 federal law Plaintiffs mention is 42 U.S.C. § 1983, which merely creates liability for state
8 actors who deprive people of their constitutional rights. Federal law cannot provide the remedy
9 that Plaintiffs seek. Guam law is the only possible source of remedy. Title 3 of the Annotated
10 Guam Code, Chapter 12 provides a detailed framework for the Superior Court of Guam to
11 conduct a special session, hold a trial to determine a contested election, conduct a recount,
12 annul the prior certification of results, and declare a new winner. 3 G.C.A. §12101 *et seq.* Any
13 decision on the merits must come from Guam law, and Guam law provides the legal apparatus
14 that Plaintiffs need. This factor, too, counsels in favor of abstention.

15 Third, the state court proceeding can adequately address the rights of the federal
16 plaintiff. As a court of general jurisdiction, there is no reason why the Superior Court of Guam
17 cannot address Plaintiffs' claims. Further, even after an abstention, the Court retains its ability
18 to award the attorney fees requested by Plaintiffs should such an award be necessary. “[W]e
19 hold that the abstaining district court . . . may award attorneys' fees under § 1988 for services
20 performed in litigating both state and federal claims in the state courts.” *White Mt. Apache
21 Tribe v. Williams*, 1984 U.S. App. LEXIS 25725, *14 (9th Cir. Feb. 7, 1984). This factor does
22 not weigh against abstention.

23 **III. CONCLUSION**

24 The Court is deeply concerned with the “virtually unflagging obligation of the federal
25 courts to exercise the jurisdiction given them.” *Colo. River*, 424 U.S. at 817. However, the
26 Court is convinced that these are the sort of exceptional circumstances where abstention is

1 warranted. Accordingly, Defendants' motion to remand is GRANTED. (Case No. 1:10-cv-
2 00033 (Dkt. No. 5).) All proceedings in Case No. 1:10-cv-00031 are STAYED pending the
3 outcome of litigation in the Superior Court of Guam.

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5 DATED this 22nd day of December, 2010.

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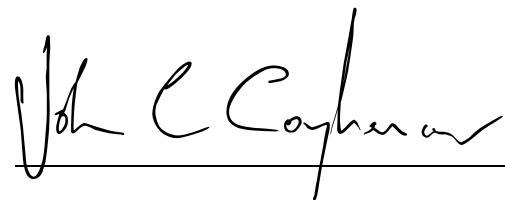
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A handwritten signature in black ink, appearing to read "John C. Coughenour", is written over a horizontal line.

John C. Coughenour

UNITED STATES DISTRICT JUDGE